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George D. Braden

Yale University School of Law

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MR. JUSTICE MINTON AND THE TRUMAN BLOC

GEORGE D. BRADEN*

I

The difficulty with this article is deciding what to include in it. I start with certain facts and certain theories that have to be worked with in delineating Mr. Justice Minton's first year. A fact of great importance is that the United States Supreme Court is a collegiate body. Mr. Justice Minton is one of nine. Hence the Justice's first year is in many respects simply the Supreme Court's 159th. Yet the 159th year surely differed from the 158th, and Mr. Justice Minton partly explains the difference.

That means either that I write purely about Mr. Justice Minton and produce a distorted picture or I write an article about the 1949-50 term. Certainly I shall not do the latter, for that is competently handled by others¹ and in any event was not asked for by the Editors of this Journal. A distorted picture it must be then.

What goes into this distorted picture? If the focal point is Mr. Justice Minton, there are only two things I can do: write about his opinions and write about his votes. So far as his opinions are concerned, it seems inappropriate to write about them from the point of view of the law, for that is an adventitious differentiation from other cases in which he participated but did not write. Furthermore, to discuss any opinion of Mr. Justice Minton as to the "law" is not to write about him but to write about a legal subject. But I can discuss his opinions from the point of view of his technique in writing them.

About Mr. Justice Minton's votes I can write in general terms; that is, I can present statistics on the number of times he dissented and the relationship of his dissents to those of other justices. I can even take a flyer and align him with a particular group of the justices. And to the extent that his votes in one year give any clear indication of his philosophy as a justice, I can express some opinion about that philosophy. But passing judgment on another man is a highly subjective matter. In the case of the Supreme Court, the

* Associate Professor of Law, Yale University School of Law.

1. I refer to my colleague John P. Frank's annual article on the Court in the University of Chicago Law Review and to the newly instituted annual survey in the student section of the Harvard Law Review. See 18 *CHI. L. REV.* 1 (1950); 64 *HARV. L. REV.* 114 (1950).

criterion for judgment is primarily one's own opinion of what the Court ought to do in our society today. Hence, to write about Mr. Justice Minton's philosophy, so far as it is revealed, involves some explanation of one's own philosophy. This article will therefore deal with Mr. Justice Minton's opinions, his votes, and, in the area where his philosophy seems to be expressed, a judgment of that philosophy.

II

MR. JUSTICE MINTON'S OPINIONS

Mr. Justice Minton was an important member of the Court during the 1949-50 term. He wrote twelve opinions, more than a fair share for any justice, and certainly an admirable production for the junior justice.² Five of these were important cases,³ judging by the vigor of the dissents. The twelve opinions also fairly well covered the range of customary Supreme Court litigation: searches and seizures, composition of a jury, admission to the country of a G.I. bride, patents with anti-trust overtones, peaceful picketing, income tax, criminal procedure, statutory interpretation of federal statutes dealing with commerce and labor relations, and judicial review of administrative findings. As a matter of sheer output, Mr. Justice Minton can be well satisfied with his first year. Whether or not the readers of his opinions are satisfied with them is another matter.

In recent years a new method of opinion writing has appeared on the horizon. Justices have sometimes written informative essays about the legal issues before them. In a burst of candor, a spokesman for the Court has occasionally revealed the underlying reason for a traditional set of rules.⁴ This, it seems to me, is the technique most suitable for the Supreme Court. As the highest tribunal in the country, it speaks principally on important national problems. It exists for more than the litigants before it, and it ought to speak to the country as a whole, not to the litigants alone. But to speak meaningfully to the entire country requires clear statements of controlling reasons behind decisions.

Mr. Justice Minton can obviously write an excellent, informative opinion. Take *United States v. Rabinowitz*,⁵ the searches and seizures case which was

2. Actually, Mr. Justice Clark, with no previous judicial experience, also wrote 12 opinions, which is perhaps an even more admirable production.

3. *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537 (1950); *United States v. Alpers*, 338 U.S. 680 (1950); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Dennis v. United States*, 339 U.S. 162 (1950); *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950).

4. See *Rescue Army League v. Municipal Court*, 331 U.S. 549, 568-574 (1947); *United Public Workers v. Mitchell*, 330 U.S. 75, 90-91 (1947).

5. 339 U.S. 56 (1950). Briefly, the facts were: knowing that Rabinowitz had sold forged postage stamps, U.S. agents obtained an arrest warrant. With this the agents went to Rabinowitz' one-room place of business, open to the public, arrested Rabinowitz, and over his objections searched the room, finding many forged stamps.

his most important opinion of the year. After a quick summary of the maze of cases on searches and seizure, Mr. Justice Minton brought the ultimate issue out into the open. "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test."⁶ He then considered the test of whether there was time to get a search warrant, laid down in the recent *Trupiano* case,⁷ and found that, though "appealing from the vantage point of administration,"⁸ there were objections to this sort of rule. On balance, the Justice argued, the criterion of time is outweighed by arguments of the necessities of police administration. In the end, he laid down the rule that "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." "That criterion," he continued, "in turn depends upon the facts and circumstances—the total atmosphere of the case."⁹ And to top it off, he noted that under his rule "law officers must justify their conduct before courts which have always been (sic), and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment."¹⁰ This is honest, good opinion writing.

Another example, almost as noteworthy, is *Dennis v. United States*.¹¹ This case raised the question whether, in view of the loyalty program of the United States, an important Communist on trial in the District of Columbia for contempt of Congress could challenge all government employees as potentially biased jurors. The question was somewhat narrowed because little more than a year previously the Court had had a full dress debate on the propriety of government employees in Washington sitting as jurors in criminal cases. The decision had been against wholesale disqualification.¹² Hence, in *Dennis*' case there seemed little reason to deal with anything more than the relationship of the loyalty program to the trial of an important Communist for contempt of Congress.

Again, regardless of one's view of the result, the technique of the opinion is eminently satisfactory. Mr. Justice Minton treated the problem in the context of the time when it arose. This, he pointed out, was literally before the loyalty program went into operation. By illustration from the questioning of prospective jurors he demonstrated that whatever might be the long run effect of the loyalty program, or even the effect at the time he wrote, it was hardly a significant factor in the minds of the jurors chosen at the trial. Thus by stressing actual bias as opposed to "constructive" bias, he at once covered

6. 339 U.S. 56, 63 (1950).

7. *Trupiano v. United States*, 334 U.S. 699 (1948).

8. 339 U.S. 56, 65 (1950).

9. *Id.* at 66.

10. *Ibid.*

11. 339 U.S. 162 (1950).

12. *Frazier v. United States*, 335 U.S. 497 (1948).

the case before him without closing the door to other cases at other times. It is possible to disagree with the reasoning of the opinion; it is not possible to deny that the reasoning is clearly set forth.¹³

Unfortunately, Mr. Justice Minton's opinions were not always so good as the *Rabinowitz* and *Dennis* examples. He frequently seemed to be following Mr. Chief Justice White's dictum that to state the proposition is to answer it. On occasion, Mr. Justice Minton stated the question for decision in such a way as to give the answer, thus apparently avoiding the necessity for setting forth any indication of the method by which he reached his conclusion.

Take *United States ex rel. Knauff v. Shaughnessy*,¹⁴ a case of a G. I. war bride excluded from the United States without a hearing and without a statement of the reasons for the exclusion. Mr. Justice Minton said the question presented was whether Mrs. Knauff could be excluded without a hearing. Surely the problem presented by this question was the reconciliation of two apparently contradictory policies enunciated by Congress. One policy was to give the President great power during the war emergency to exclude aliens who were security risks.¹⁵ The other and later policy was to relax greatly the strict immigration requirements insofar as concerned G. I. war brides.¹⁶

With such conflicting policies it would seem appropriate to consider what lay behind each statute, the conditions when each was passed, and the situation when the actual case arose. It would seem appropriate to consider that to become a G. I. war bride required permission of military authorities who were "not without a vigilant and security-conscious intelligence service."¹⁷ It would seem appropriate to consider whether a Congressional declaration in the War Brides Act of a different "termination of hostilities" date from that otherwise obtaining indicated that Congress knew the war was over and that whatever might be the technical status of other statutes, the strictures of WAR did not apply to favored war brides.

Such a delicate balancing of policies was not Mr. Justice Minton's technique. He looked at the statute purporting to authorize the exclusion and found that it authorized exclusion without a hearing. The War Brides Act? It did not in specific language say that the exclusion provision did not apply; hence, the War Brides Act was immaterial.

Suppose that Mr. Justice Minton had begun his opinion: May a war bride otherwise admissible by virtue of the generous War Brides Act, be ex-

13. Other opinions which indicated to a greater or lesser extent the "reason for the rule" were: *Commissioner of Internal Revenue v. Connelly*, 338 U.S. 258 (1949); *Reider v. Thompson*, 339 U.S. 113 (1950); *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157 (1950).

14. 338 U.S. 537 (1950).

15. 55 STAT. 252, 22 U.S.C. § 223 (1941).

16. 59 STAT. 659, 8 U.S.C. § 232 *et seq.* (1945).

17. 338 U.S. 537, 550 (1950) (dissenting opinion).

cluded without a hearing on the authority of a war emergency statute previously enacted? From such a beginning one would immediately know the answer. But again one would not have the foggiest notion how the Court got the answer.

The ground for the *Knauff* decision escapes me. Is the theory that as between an exclusionary statute and an "admissionary" statute, the former always prevails? Or does the Court think that in 1950, the year of hysteria, the old saw is amended to read "anything is fair in war or cold war?" Or is it that the sovereign can do no wrong, at least to aliens, and courts must not question? I do not know, for Mr. Justice Minton does not tell me. The process by which he obtained the answer does not appear in the opinion.

Other opinions by the Justice follow the same technique. *Colgate-Palmolive-Peet Co. v. N.L.R.B.*¹⁸ begins: "The question we have here is whether a closed-shop contract, entered into and performed in good faith, and valid in the state where made, protects an employer from a charge of unfair labor practices under the National Labor Relations Act."¹⁹ Obviously, the answer is yes. But the opinion could have started: The question we have here is whether the National Labor Relations Board can find an employer guilty of unfair labor practices if the employer, pursuant to a valid closed shop contract, discharges, at the behest of the union, employees who had sought to get a different union to represent them. Mr. Justice Minton's opinion gives no hint why he worded the question one way and not the other. The answer to the question is given but the reasons are not.²⁰

Even in dissent, where a justice frequently takes advantage of the dissenter's freedom of exposition, Mr. Justice Minton used a loaded-question technique. In *Wissner v. Wissner*,²¹ the question before the Court was whether the Congressional declaration that the proceeds of G.I. insurance were to go to the beneficiary of an insured²² precluded a state court in a community property state from ordering the beneficiary to share the proceeds fifty-fifty with the insured's widow. Mr. Justice Clark, for the majority, disposed of the question by noting (1) that Congress said the insured could choose the beneficiary and (2) that Congress insulated the proceeds in extremely broad language.²³ For the dissenters, Mr. Justice Minton saw the question as one of the "intent" of Congress but not whether Congress intended to override state law. It was

18. 338 U.S. 355 (1950).

19. *Id.* at 356.

20. Another "loaded question" opinion is *Bryan v. United States*, 338 U.S. 552 (1950).

21. 338 U.S. 655 (1950).

22. 38 U.S.C. § 802 (g).

23. Payments "shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 454a, made a part of the Act under discussion by 38 U.S.C. § 816.

whether Congress "intended to say to a serviceman, 'You may take your wife's property and purchase a policy of insurance payable to your mother, and we will see that your defrauded wife gets none of the money.'"²⁴ As I read the dissent, Mr. Justice Minton decided that the question was whether Congress meant to commit "fraud." Put the question this way, and who can disagree? But the problem was to find reasons for overriding state law or to resolve the conflict between an apparently absolute provision of Congress and the peculiarities of the law of community property states. The majority decided the question by reading the statute and stopping. Mr. Justice Minton would apparently have decided it by loading the question. Although neither opinion offers much in the way of underlying reasons,²⁵ the majority opinion at least resolves the issue more fairly.

Another technique of Mr. Justice Minton is that of keeping the discussion so close to the precedents that the true issue is not brought out. An example is *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*²⁶ This case involved a patent license arrangement whereby the licensee agreed to pay a royalty on all sales whether or not any of the patents were utilized. The licensee sought to analogize the case to the forbidden "tie-in" sales. Mr. Justice Minton stated simply that no "tie-in" sales were involved. Thus the reader of his opinion is left wondering. Is it that the Justice approves of patent monopolies and wants to interfere as little as possible? Or does he believe that if a corporation makes a bad bargain it should be stuck even though an extension of the patent monopoly is involved? Or does he disapprove of mixing patent law with anti-trust law? The facts in this case cover an extension of a patent monopoly beyond the simple collection of a royalty for use of a patent. This extension is held to be legal, but we are not told why, beyond the

24. 338 U.S. 655, 663-664 (1950).

25. From the silence about hearings and debates, I assume that the community property state Congressmen said nothing about the statute. I should be interested in knowing what the United States argued in its *amicus* brief. For example, how would a contrary decision affect the Veterans Administration in keeping track of designation of beneficiaries. If Congress meant not to "defraud" community wives, the VA ought to have to investigate every designation of a beneficiary. Perhaps it would have to issue instructions that married soldiers from community property states can designate a beneficiary for only half the amount of the policy.

I would also speculate about Congress' intent to defraud where Class F allotments were concerned. Under that scheme the lower ranking enlisted men contributed a portion of their salary to their dependents and the United States more than matched it. If a soldier earning \$50 received \$30 himself, with \$20 allotted to his wife—an allotment that a wife could force on her husband—and the Government added \$30, what is the community? If a soldier took out insurance, the premium was deducted from his \$30; the wife paid none. It hardly seems likely that Congress would have "intended" to superimpose community property legal tangles upon its simple arrangements for support of dependents.

26. 339 U.S. 827 (1950).

narrow statement that it is not exactly like other extensions previously held illegal.²⁷

Perhaps the most unusual opinion of Mr. Justice Minton was one not employing either of the techniques discussed above and yet one that still succeeded in leaving the reader confused about the real basis for decision. This nasty little case, *United States v. Alpers*,²⁸ involved a shipment interstate of some obscene phonograph records. The criminal statute in point forbids interstate shipment of any obscene "book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character."²⁹ Mr. Justice Minton first announced that criminal statutes are to be strictly construed. "This means that no offense may be created except by the words of Congress used in their usual and ordinary sense."³⁰ So far so good. The stage was set to leave phonograph records outside the statute. But no, the Justice pointed out that the Court must not "defeat the manifest intent of Congress."³¹ ("Manifest intent" is nearly always the sign for the use of legerdemain.)³² With this opening gambit, the opinion disappeared into a cloud.

First, the rule of *ejusdem generis* floated away. The Court of Appeals had used this rule to find the intent of Congress. By that ancient rule phonograph records are omitted, because the genus of things enumerated in the statute is obviously things to look at. Mr. Justice Minton made *ejusdem generis* disappear by saying that it was not to be used to "defeat the intent and purpose of Congress."³³

Second, the Justice embraced the "obvious purpose" of Congress. That, he said, was to "prevent the channels of interstate commerce from being used to disseminate any matter that, in its essential nature, communicates obscene, lewd, lascivious or filthy ideas."³⁴

Third, the Justice found "nothing in the statute or its history to indicate that Congress *intended* to limit the applicable portion of the statute to such indecent matter as is comprehended through the sense of sight."³⁵ Notice that the pen is quicker than the eye. Mr. Justice Minton started out to get

27. Two other opinions that are pretty much confined to a discussion of the precedents and nothing more are *Building Service Employees v. Gazzam*, 339 U.S. 532 (1950), and *International Brotherhood v. Hanke*, 339 U.S. 470, 481 (1950) (dissenting).

28. 338 U.S. 680 (1950).

29. 18 U.S.C. § 1462.

30. 338 U.S. 680, 681 (1950).

31. *Id.* at 681-682.

32. See Chafee, *The Disorderly Conduct of Words*, 41 COL. L. REV. 381, 400 (1941).

33. 338 U.S. 680, 682 (1950).

34. *Id.* at 683. In developing this he quoted the rest of the statute. This remainder deals with contraceptives and abortion. These are "filthy" ideas of quite another sort and hardly get one any closer to obscene phonograph records.

35. *Id.* at 684. (*Italics added*).

phonograph records into a statute which left them out and ended up defying anyone to show him that phonograph records were not there.

The decision may be a good one; the reasons are not. The "obvious purpose" used to get around the *ejusdem generis* canon covers too much. It might include any parent who put his child onto an interstate train knowing that the child might write a dirty word on a wall. It would surely include all corporations that pay the expenses of the proverbial traveling salesman. Indeed, if Congress were to write the statute in Mr. Justice Minton's own words, the statute might very well be void for vagueness.³⁶ In short, Mr. Justice Minton, in order to cover things to look at and things to listen to, had to make a generalization so broad that many irrelevant things could logically be included.

The *Alpers* case was probably one of those occasional cases when the Court dared not give its reason for decision. Quite likely the reasons were those Max Radin attributed to the Court on another occasion. "[The Court] did not desire to connive at sexual immorality in any way."³⁷ If so, Mr. Justice Minton is not to be blamed for his construction of the argument. If anything, his trouble was that he wrote, as he nearly always does, so clearly and directly that he could not hide what he was doing. Perhaps this case might better have been assigned to a justice who could write an opinion so obscure that no one could pin it down.³⁸

Mr. Justice Minton can write a direct, well-reasoned, fully enlightening opinion. More frequently, he turns out an opinion saying no more than enough to get the case decided. This may make for dispatch in judicial business; it does not make for understanding of the decision-making process of the ultimate tribunal of the country.

III

MR. JUSTICE MINTON'S VOTES

Mr. Justice Minton was an important member of the Court in a quite different sense. To anyone who follows the Court closely, it is obvious that the Court changed its direction markedly. It seems fairly clear that a goodly number of cases decided during the past year would have gone another way had both Justices Murphy and Rutledge lived.³⁹ In fact, many of the same

36. Cf. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

37. Radin, *Statutory Interpretations*, 43 HARV. L. REV. 863, 883 (1930).

38. See *Roth v. Delano*, 338 U.S. 226 (1949), one of the most obscure opinions I have ever read.

39. In the listing that follows I certainly cannot claim infallibility. I can assert only that my guess would be accurate frequently enough to produce a "goodly number."

a. Cases, all decided in 1950, which would have been decided otherwise by majority vote:

cases would have gone another way had only one of the late justices lived.⁴⁰ Hence one can argue that Mr. Justice Minton was an important factor in the shift in direction.

The significance of the change can also be demonstrated by a consideration of the past year's dissents. Notwithstanding the controversy about typing justices by statistics,⁴¹ I note that during the recent year the dissents of the justices other than Mr. Justice Douglas⁴² were as follows:⁴³

Roosevelt appointees		Truman appointees	
Black	32	Vinson	2
Reed	17	Burton	7
Frankfurter	32	Clark ⁴⁴	0
Jackson	25	Minton	5

Equally instructive is the pattern of dissent. In 52 cases only a Roosevelt appointee or appointees dissented. In one case only a Truman appointee

United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537.

United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521.

United States v. Rabinowitz, 339 U.S. 56.

Darr v. Burford, 339 U.S. 200.

American Communications Assn. v. Douds, 339 U.S. 382 (in part).

United States v. Kansas City Life Ins. Co., 339 U.S. 799.

Johnson v. Eisentrager, 339 U.S. 763.

- b. Cases, all decided in 1950, which would have gone the other way by *per curiam* affirmance by an equally divided Court, or, if held for Mr. Justice Douglas' return would have gone the other way by a majority vote:

United States v. Bryan, 339 U.S. 323.

United States v. Fleischman, 339 U.S. 349.

- c. Cases which would have gone the same way by equal division, but if held for Mr. Justice Douglas' return would have gone the other way by majority vote:

United States v. Yellow Cab Co., 338 U.S. 338 (1949).

Savorgnan v. United States, 338 U.S. 491 (1950).

Dennis v. United States, 339 U.S. 162 (1950).

International Brotherhood v. Hanke, 339 U.S. 470 (1950).

40. Assuming that the cases would have been held until Mr. Justice Douglas returned, the *Knauff*, *Eichenlaub*, *Rabinowitz*, and *Burford* cases, and the *Douds* case in part, would have gone the other way. The same might have been true of the *Dennis* case were Mr. Justice Jackson willing to go along with a majority.

41. The practice of using statistics in appraising the Court has come in for considerable criticism recently. See FREUND, ON UNDERSTANDING THE SUPREME COURT 8-9 (1949); Howe, *Justice in a Democracy*, 184 ATLANTIC MONTHLY 34 (Dec. 1949). The customary method of attacking the statistics is to explain votes as "on other grounds" for each of the several cases used in a statistical table. I am reminded of the conversation I once had with an economist friend. I asked why all good economists left a particular college. He quickly ran through the list and produced a different reason for each one's departure. I pointed out that he had explained each departure but that he had not explained why they *all* left.

42. To give the anti-statisticians something to shoot at, I note that an extrapolation of Mr. Justice Douglas' short record at the end of the term gives him 24 dissents for the whole term.

43. Companion cases are counted as one. Per curiam dispositions not on the merits are not counted.

44. In these dissenting days, this represents remarkable self-control.

dissented. There were twelve cases of mixed dissent and only one of these had more than one Truman appointee in the dissenting ranks. When the Truman appointees go, they all go together; and as the Truman appointees go, so goes the Court.

It is true, however, that the large number of dissents by the Roosevelt appointees does not indicate that they are in agreement. Although Justices Black and Frankfurter each dissented 32 times, they were together in dissent only eleven times. The old cleavages on the Court continue to exist. But whereas Mr. Justice Reed used to be known as the "swing man,"⁴⁵ now the Truman bloc does the swinging. Obviously, they "swing," else Justices Black and Frankfurter, members of different blocs on the old Court, would not be separated so frequently. By the same token an important key to the past term, and therefore to Mr. Justice Minton, is the group of cases in which Justices Black and Frankfurter dissented together. Eight of those eleven dissents together were, broadly speaking, cases of civil liberties.

After only one year on the Court, the pattern of votes is not clear enough to blueprint Mr. Justice Minton's position in all respects. No more can be said now than that he belongs to the Truman bloc and that this bloc is apparently not identifiable consistently with the late Black-Douglas-Murphy-Rutledge bloc or the late Stone-Roberts-Frankfurter-Jackson bloc. So far as civil liberties are concerned, the Truman bloc has pushed the Court in a direction that has evoked the combined protests of remnants of both previous blocs. The most conspicuous development of the year was that the Truman bloc, including Mr. Justice Minton, failed to stand up for civil liberties in the manner we had become accustomed to expect of the Court.

IV

MR. JUSTICE MINTON AND CIVIL LIBERTIES

The Court's remarkable shift in direction in the field of civil liberties indicates Mr. Justice Minton's position on this subject. Of course, I do not know what Mr. Justice Minton considers his judicial function in civil liberties cases. I can only view the result. But I do know what I believe ought to be the Court's function and Mr. Justice Minton's votes seem to me to be unfortunate.

These are times of the most ridiculous hysteria. America has become confused in its hurried effort to develop a foreign policy of containment of a resurgent imperialist power, Russia, which uses a novel technique, ideology, to further its program. By accident or design, many Americans have mixed up ideologies, domestic policies, espionage, and foreign policies until we seem

45. See Comment, 1 *STAN. L. REV.* 714 (1949).

hell-bent to destroy ourselves. From the reputedly sane, intelligent, and respectable American Bar Association comes a hasty and unconsidered⁴⁶ endorsement of the McCarran Anti-Subversive bill. From California comes an incredible battle over loyalty oaths. From the hustings comes an almost universal attempt, usually successful, to place all political issues in a context of red-mongering. From the entertainment world comes the spectacle of large advertisers quailing before self-appointed censors of the political views of all entertainers. From legislatures and municipal councils all over the country comes a scramble to see which can enact the most outrageous anti-Communist legislation. Repression and restraint have grown to alarming proportions.

Our crying need is for some institution to stand as a bulwark against current unreasoning excesses. The United States Supreme Court is well suited to do this. It has great prestige, it is aloof from short-run expediency, it has "tenure" of sorts,⁴⁷ it has an armory of arguments to back up its pronouncements. The Constitution, the American heritage, and the past decisions of the Court are all at hand to support an effort by the Court to stop the trend of events.

The Supreme Court had many opportunities last year to call a halt to the growing erosion of our traditional liberties. That a majority of the Court, of which Mr. Justice Minton was almost always an important member, declined to do so is all too evident from the record. There were seven occasions during the term when the Court could either have spoken out strongly against current abuses or at least decided an issue in such a way as to slow down and hamper the more extreme acts of other branches of the Government.⁴⁸ In one of the seven, the Court did the "right" thing by deciding that the Immigration and Naturalization Service was not above the requirements of the Administrative Procedure Act.⁴⁹ In the other six cases the Court either gave comfort to McCarthyism as in the *Knauff*, *Eichenlaub*, *Dennis*, *Fleischman*, and *Bryan* cases;⁵⁰ or produced such a muddled set of opinions, as in the Communist Taft-Hartley Act oath case,⁵¹ that all sides could find some comfort. In

46. The House of Delegates voted its endorsement so soon after the bill was reported from the Conference Committee that few delegates could have known the details.

47. Impeachment and "court-packing" are potential interferences with tenure.

48. American Communications Ass'n v. Douds, 339 U.S. 382 (1950); United States v. Fleischman, 339 U.S. 349 (1950); United States v. Bryan, 339 U.S. 328 (1950); Dennis v. United States, 339 U.S. 162 (1950); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950).

49. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

50. For the named cases, see note 48 *supra*. Note that all of these cases plus the *Douds* case, note 51 *infra*, are included in note 39 *supra*.

51. American Communications Assn. v. Douds, 339 U.S. 382 (1950). Mr. Justice Minton did not sit in the *Douds* case, but he later indicated his position in *Osman v. Douds*, 339 U.S. 846 (1950).

times like the present, comfort to all sides is really only comfort to the forces of fright.⁵²

If the Court had been of a mind to combat the developing trend, it could have gone beyond the cases directly in point and taken steps which would have had the effect of strengthening the way of life we proclaim to the world. In this area the picture is not all black for there were the three segregation cases unanimously decided in a manner consistent with and a little bit beyond the preceding decisions.⁵³ But the searches and seizures case⁵⁴ could have been a strong warning to an over-zealous police. The Court could have decided that the time had come for supporting a democratic apportionment system;⁵⁵ or could have reversed the trend of cases cutting into the effectiveness of the constitutional right to counsel;⁵⁶ or could have reversed the trend which indicates that the Constitution does not follow the flag, or if it does, follows halfheartedly.⁵⁷ All in all, the Court gave the impression of being frightened of denunciation on the floor of the Senate or in the editorials of the Hearst press.⁵⁸

There is an American heritage of freedom. We hold ourselves out to the world as an example of the democratic way of life. As one of the important institutions of American government, the Supreme Court has an obligation to support and strengthen this great American ethic. As an institution set apart, independent and aloof from the daily pressure of events, it should stand most firmly for the ultimate American goal at the very time when current fears have numbed the vision of lesser men.⁵⁹

It is no answer to say that regardless of personal preferences, the Court should do no more than decide "cases and controversies." Of course, the Court "interprets" the Constitution and "applies" statutes according to the

52. A possible eighth case is *Parker v. County of Los Angeles*, 338 U.S. 327 (1949). By delaying decision on a state Communist oath question, comfort is given to McCarthyism. But the grounds for decision, pendency of a similar case in the state court, seem appropriate for its disposition.

53. *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Henderson v. United States*, 339 U.S. 816 (1950).

54. *United States v. Rabinowitz*, 339 U.S. 56 (1950), discussed *supra* p. 154.

55. See *South v. Peters*, 339 U.S. 276 (1950), declining jurisdiction to consider the "county unit" method of voting in Georgia primaries, on the authority of *MacDougall v. Green*, 335 U.S. 281 (1948), and *Colegrove v. Green*, 328 U.S. 549 (1946).

56. See *Quicksall v. Michigan*, 339 U.S. 660 (1950).

57. See *Johnson v. Eisentrager*, 339 U.S. 763 (1950), refusing the privilege of habeas corpus to aliens captured abroad, tried abroad, imprisoned abroad, all by the U.S. military. Cf. *In re Yamashita*, 327 U.S. 1 (1946).

58. Cf. Mr. Justice Frankfurter's opinion "respecting the denial of the petition for writ of certiorari," *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950), where he clearly sought to prevent the denial of certiorari from supporting any conclusions about the merits.

59. ". . . the fundamental law of the Constitution . . . is an appeal from the people drunk to the people sober." MCLWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* 245 (1939).

"will" of the lawmakers. But it is too late to argue seriously that this is a mechanical process whereby all men of equal powers of reasoning reach the same result. The Court "makes" law in its limited area; it has alternatives presented to it, either of which can almost always be chosen with equal technical facility. The over-all course of decision is governed by considerations more general than the specific phrases of the Constitution or the specific words of a statute.⁶⁰ The key question is: to what end does the Court do its work?

It would be sufficient to stop with the observation that Mr. Justice Minton apparently does not hold the same view of the Court's function that I do, were it not for the fact that the work of the majority of which he is a member seems equally inconsistent with most of the traditional theories of the function of the Court. For example, it has been said that the Court serves as a balance wheel in our society.⁶¹ In this view the Court is to slow down great legislative swings. The Court is not supposed to preserve a static society; it is simply supposed to keep governmental policy from going too far too fast. If the present majority on the Court followed this theory, it would in all likelihood react against what appears to be an exceedingly headlong legislative and executive swing away from the course of the past. The Court can hardly have been much of a "balance wheel" last term.⁶²

There is also a theory that safe government is limited government and that an excellent way to limit government is to disperse power, geographically by federalism, internally by separation.⁶³ If our fear is arbitrary and tyrannous government, we can best prevent tyranny by preventing concentration of governmental power. The means for this is the separation of functions, executive, legislative, and judicial; and the institution of separate sovereigns, each with power, as in our federalism of states and the Federal Government. This theory puts the Court under an obligation to compete for power; otherwise, as the legislature and executive exert more power, the Court becomes relatively unimportant and the purpose of separation is defeated. In the present situation, adherence to this theory would seem to call for selective

60. See Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L. J. 571 (1948).

61. See Barrows, *The Constitution as an Element of Stability in American Life*, 185 ANNALS 1 (1936).

62. Another theory, very much similar, has been called a "cushioning theory." See STRONG, AMERICAN CONSTITUTIONAL LAW 418 (1950), quoting Havighurst, *The Courts in a Democracy*, 42 ILL. L. REV. 567, 570-571 (1947). Here the argument is that in the struggle for power among different groups in society, as one group loses its grip on the legislature the Court steps in to "cushion" its loss of power. Thus, shifts in power can be gradual and revolutionary tendencies curbed. Under this theory, the "liberal" groups in the ascendancy under Roosevelt, having lost their political power, would find refuge in the Court. Such refuge would mean curbing the present tendency to use Communism to belabor New Dealism.

63. See STRONG, *op. cit.* *supra* note 62, at 27-39.

statutory interpretation and strict enforcement of traditional judicial requirements of burden of proof and the like,⁶⁴ all to the end of softening the harshness of the actions of the legislature and executive. During the past term, the Truman bloc can hardly be considered to have asserted much power along these lines.

Another theory is the so-called "political process" theory.⁶⁵ Here the argument is that the Court ought in general to leave the legislature alone except when there is a threat to freedom of speech, press, and the other protections of the political process. Underlying this is the assumption that the electorate can be relied on to prevent its government from destroying freedom, an assumption that in turn depends upon the electorate's having free access to information. There is a variation on this theory which calls for special judicial protection of minorities for the reason that legislation aimed at minorities is based on prejudice which cannot be swept away simply by public argument.⁶⁶ If Mr. Justice Minton adhered to the "political process" theory, it seems probable that he would have voted differently in many of the civil liberties cases, for the atmosphere of current government is clearly

64. For example, the *Knauff* and *Eichenlaub* cases could have gone the other way by "reasonable" statutory interpretation; the *Bryan* and *Fleischman* cases could have been decided otherwise on burden of proof grounds. (For citations, see note 48 *supra*.)

65. See Braden, *op. cit. supra* note 60, at 582; STRONG, *op. cit. supra* note 62, at 370.

66. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938); Lusky, *Minority Rights and the Public Interest*, 52 YALE L. J. 1 (1942); Braden, *op. cit. supra* note 60, at 580.

This *Carolene Products* footnote continues to produce controversies. In a concurring opinion in *Kovacs v. Cooper*, 336 U.S. 77, 90-95 (1949), Mr. Justice Frankfurter launched a great attack on the footnote. He there pointed out that "incidentally, [the footnote] did not have the concurrence of a majority of the Court." This is true, for the only justices signing the opinion in full had been Hughes, Brandeis, Stone, and Roberts. Mr. Justice Frankfurter also pointed out that perhaps the strongest reliance on the theory of the footnote was *Thomas v. Collins*, 323 U.S. 516 (1945), but that that "was the opinion of only four members of the Court." (P. 94) This may be true; if it is, the case is incorrectly reported, for, as I understand it, if a majority cannot agree on an opinion, the leading opinion reads "Mr. Justice _____ announced the judgment of the Court and an opinion concurred in by . . ." [See *New York v. United States*, 326 U.S. 572 (1946).] Even so, if the signers of the opinion in the *Carolene* case still sitting in the *Collins* case are added to the signers in the latter, the number jumps to six—Stone, Roberts, Black, Douglas, Murphy, and Rutledge, J.J. And it becomes seven if Mr. Justice Reed is added as seems appropriate, since his *Kovacs* opinion and citation of the *Collins* case are what induced Mr. Justice Frankfurter's concurring opinion. Perhaps Mr. Justice Frankfurter was trying to prove the futility of head-counting. Cf. FREUND and Howe, *op. cit. supra* note 41.

It is also curious that one of the cases citing the *Carolene* note was *A. F. of L. v. Swing*, 312 U.S. 321 (1941), written by Mr. Justice Frankfurter. In the *Kovacs* concurrence, he discounted the significance of the citation by noting that it was used "in support of the statement that the 'right to free discussion' 'is to be guarded with a jealous eye.'" 336 U.S. 77, 92 (1949). Inasmuch as his quarrel with Justice Reed is based on the latter's reference to "the preferred position of freedom of speech" (*Id.* at 88), I can only conclude that either Mr. Justice Frankfurter has repudiated his position in the *Swing* case, or he believes that a metaphorical statement is meaningless. Personally, I think that something "guarded with a jealous eye" has a "preferred position."

destructive of free and open discussion. And if the minorities variation were accepted, a counterthrust of decision would seem even more strongly called for, since current intimidation falls most heavily on minorities.

Even if Mr. Justice Minton believes he is to do no more than stick to the Constitution, a different course would seem called for. One has only to read the Bill of Rights to see that the United States was formed in an atmosphere of great distrust of the Federal Government. It may have been distortion to read *laissez faire* into the document;⁶⁷ it is not distortion to enforce the Bill of Rights. Such enforcement does not call for the same sort of deference to legislative judgment that is now customary when economic and social regulation is attacked.⁶⁸

There is one theory of the Court's function that is consistent with the decisions of the past year, and it may well be that Mr. Justice Minton subscribes to it. This is the argument that the people must save themselves, that the Court cannot in the long run preserve liberty unless people want it, and that judicial attempts to force liberty on a people will do more to kill the spirit of liberty than to nourish it.⁶⁹ There is much to be said for this as a long-run ideal; it seems peculiarly inept in the short-run view.⁷⁰ Surely we must look at going institutions. From the beginning the Court has always stood behind legislatures, national and local, like a watchful parent. There has been no process of educating legislatures to take ultimate responsibility for their own acts, and the acts of the executive. It is too much to expect that legislatures will change their ways overnight and exercise the constitutional control necessary to fill the vacuum left by judicial abdication.⁷¹

67. See Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269 (1938).

68. In his separate opinion in the *Douds* case, *supra* note 48, Mr. Justice Jackson quotes from the *Carolene Products* case, *supra* note 66, to the effect that the Court must stop with a consideration of whether there is any rational basis for legislation. Although the quotation is accurate enough, its use is a disservice to the late Chief Justice, for the very *Carolene* footnote gave indication that his "rational basis" rule did not control freedom of speech. The same "rational basis" rule is also inconsistent with the second flag salute case, *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), written by Mr. Justice Jackson. Either Mr. Justice Jackson uses the "rational basis" approach as a make-weight or he must equate "rational basis" with some sort of "wisdom" and not use it in the sense that Chief Justice Stone used it, which was simply that a "rational basis" existed if any set of facts could reasonably be assumed by the legislature. In its fullest sense, the "rational basis" rule would appear to justify suppression of Communists and fellow travellers simply on the basis of the Communist Manifesto.

In short, if the "rational basis" test is to be used, then the First Amendment has been amended to read "Unless Congress has reason to think otherwise, it shall make no law, etc."

69. See Hand, *The Contribution of an Independent Judiciary to Civilization*, in THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1692-1942 62-67 (1944); COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1943).

70. In Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1356-57 (1941), I reached by another route the same conclusion that Hand and Commager reached. Obviously, I have abandoned my position.

71. Cf. Clark, *The Dilemma of American Judges*, 35 A.B.A.J. 8 (1949).

It seems equally important to note that Americans as a whole have not prepared themselves for self-protection. We have grown up with a tradition of external restraint on ourselves. We start with a self-limiting ordinance, a Constitution, and we acquiesce in enforcement of it by judges. The judiciary does not have authority to abandon its restraining role because it thinks we made a mistake in relying upon it. And if the judiciary decides to wean us away from mother-worship of a Constitution, it ought not to do so at a time when we are defying our own self-imposed limitations. Unlike the British, we have no constitutional conscience. We once put our conscience on paper and told the judges to make us abide by it. A conscience is needed only when it is not wanted.

Finally, the Court has no business closing out its constitutional work-shop when our legislative work-shop is so poorly organized. By and large, government in America is minority government. With a party system that is irresponsible, with outrageous misrepresentation from bad apportionment, with a legislative committee system that invites closed-door skullduggery, with a tradition of checks and balances that fosters dispersion of responsibility, with an electoral campaign system that exalts comic-books, and hill-billy bands and frowns on serious discussion of vital issues; with all this, it is hard to believe that our elected representatives represent us in any but a most attenuated sense. I am not at all sure but that the cloistered Supreme Court can measure the American pulse more accurately than our legislatures.

It is not possible to state what Mr. Justice Minton conceives his ultimate duty to be. He has said nothing about it and possibly never will. Indeed, justices rarely talk about this sort of thing. It is even possible that Mr. Justice Minton does not visualize himself as an adherent to any of the traditional theories of the role of the judiciary. But none of this matters. The effect of his votes and those of the other members of the Truman bloc is an abandonment of the great tradition of an independent and spirited judiciary. The only hope is that as conditions get worse, the Court will shift again and once more become a defender of the American faith.⁷²

72. I must add a word of thanks to my wife. Although she always exercises editorial supervision of my efforts, in this instance her criticism was so extensive that she really should be accorded joint authorship.